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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 183

TOM G. SANDERS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 57-64) is reported at 99 F. Supp. 113. The opinion of the Court of Appeals (R. 69-73) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1952 (R. 73). A petition for rehearing was denied on June 3, 1952 (R.85). The petition for a writ of certiorari was filed on July 8, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the sale of misbranded drugs to customers known by the seller to live in other states is a delivery for introduction into interstate commerce within the meaning of the Federal Food, Drug, and Cosmetic Act.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*, provides in pertinent part:

> Section 301 [21 U.S.C. 331]: The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

STATEMENT

On October 17, 1950, Tom G. Sanders, the petitioner, consented to the entry of a permanent injunction which forbade him from introducing or

delivering for introduction into interstate commerce his product, consisting of ground up hoof, horn and other external animal growth, which had been sold by him as a cure for a number of serious diseases, including cancer, diabetes, heart conditions and ulcers (R. 1-5).

On May 10, 1951, the United States Attorney filed an application for an order to show cause why petitioner should not be punished for criminal contempt for having violated the injunction on six specific occasions in that, on each occasion, petitioner sold the misbranded drug to a purchaser who, to petitioner's knowledge, had come from out of the state and who, petitioner knew, intended to return to his home outside the state with the drug. The complaint alleged that petitioner had adopted the practice of selling directly to out-of-state customers and soliciting them to return at later dates, thus circumventing the injunction. (R. 5-8.) Petitioner moved to quash the complaint (R. 38, 40), and the District Court granted the motion (R. 66), holding that the defendant was not "engaged in interstate commerce" (R. 64, 65).

On appeal, the Court of Appeals reversed and remanded the cause for trial on the merits (R. 73). The Court of Appeals held that the allegations of the complaint, which, for the purpose of the motion to quash were admitted, established that Sanders was engaged in delivering his misbranded drug for introduction into interstate commerce (R. 71, 72).

ARGUMENT

1. It should be pointed out at the outset that the judgment of the Court of Appeals did not finally dispose of this cause but remanded it to the District Court for further proceedings not inconsistent with the opinion of the court (R. 73). Before a final judgment can be rendered, a trial must be had at which the facts can be fully developed. Hence, at this stage of the proceedings, there is no necessity for a writ of certiorari to review the action of the Court of Appeals. *American Construction Co.* v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384. See Robertson & Kirkham, *Jurisdiction of the Supreme Court* (Wolfson & Kurland ed., 1951) Sec. 130, pp. 232-233.

2. In any event, the case presents no question warranting review by this Court. The opinion below follows and correctly applies the principles enunciated by this Court in such cases as *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 568, 569; *Currin* v. *Wallace*, 306 U.S. 1, 10; *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 290, 291; and *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211, 241. These decisions establish that interstate commerce includes the purchase, sale, and exchange of commodities between citizens of different states and that, where goods are purchased in one state for transportation to another, the commerce includes the purchase as well as the transportation.

Petitioner contends that he did not engage in interstate commerce because his customers, and

not he, actually transported his misbranded drugs across state lines. However, under Sec. 301(a) of the Federal Food, Drug and Cosmetic Act, it was not necessary that petitioner engage in interstate commerce; he violated both the Act and the injunction if he either introduced or delivered a misbranded drug for introduction into interstate commerce, or if he caused such an introduction or delivery. The statute covers not only the customer's transportation of a contraband article, but also the delivery of the drug for that purpose. Such prohibition of delivery for introduction in commerce falls well within the scope of congressional power to regulate interstate commerce. See ~~111, 119-125; *United States* v. *Darby*, 312 U.S.~~ *United States* v. *Kaadt et al.*, 171 F. 2d 600 (C.A. 7). Cf. *Wickard* v. *Filburn*, 317 U.S. 111, 119-125; *United States* v. *Darby*, 312 U.S. 100, 123.

The opinions of this Court cited by petitioner are not, as he claims, in conflict with the decision below. Both *Superior Oil Company* v. *State of Mississippi*, 280 U.S. 390, and *Eastern Air Transport, Inc.* v. *Tax Commission*, 285 U.S. 147, involved the validity of a state sales tax applied to the sale of gasoline to persons engaged in interstate commerce. This Court has indicated in many cases involving the power of states to tax particular transactions that decisions upholding the validity of a state statute which imposes no undue burden on interstate commerce furnish no basis for concluding that the transaction cannot be

regulated by the Federal Government under the commerce clause. *Minnesota* v. *Blasius*, 290 U.S. 1, 8; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 33; *Stafford* v. *Wallace*, 258 U.S. 495, 525, 526; *Bacon* v. *Illinois*, 227 U.S. 504, 516; and compare *Swift & Co.* v. *United States*, 196 U.S. 375, 399.

There can be, we submit, no question that the undoubted power of Congress "to keep interstate channels free from deleterious, adulterated and misbranded articles" (see *United States* v. *Walsh*, 331 U.S. 432, 434) includes the power to prevent introduction and delivery for introductions into interstate commerce of such articles.

CONCLUSION

The decision of the court below is correct and presents no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
VINCENT A. KLEINFELD,
Attorneys.

PAUL M. STEFFY,
Attorney, Federal Security Agency.

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